

REMARKS

Claims 37-54 are currently pending. As discussed in the interview, claims 37-40, 44, 45 and 53 are being amended to clarify the claimed invention and not for reasons of patentability.

As stated in the interview, Applicant respectfully submits that a *prima facie* case of obviousness has not been established. Claims 37-54 are not anticipated or made obvious by U.S. Patent No. 6,248,396 to Helf (Helf) in view of U.S. Patent No. 3,907,582 to Walter (Walter) and U.S. Patent No. 5,306,750 to Goodrich (Goodrich). Still further, even if these references are combined with U.S. Patent No. 3,891,585 to McDonald (McDonald), claims 37-54 are not anticipated or made obvious.

These references alone or in combination do not disclose or suggest performing a stability test and a fatigue test on at least one asphalt mixture and then selecting an asphalt mixture for a roadway interlayer **after performing** the stability and fatigue tests and **based on** the results of the stability and fatigue tests, as claimed by Applicant. There is no teaching or suggestion in the cited references of balancing fatigue and stability properties when selecting an asphalt mixture for making an improved interlayer. Applicant's invention is making an interlayer by selecting an asphalt mixture for making that interlayer that has optimal stability and fatigue performance.

As pointed out in the interview, the words "based on" and "interlayer" in the claims cannot be ignored. The words "interlayer" and "based on" must be given weight because they are important in defining the invention. For clarification, independent claims 37 and 45 have been

amended to better explain the term “based on”. The asphalt mixture for the interlayer is selected **after performing** stability and fatigue tests. This is key because a better interlayer can be created by selecting an asphalt mixture having optimal stability **and** fatigue performance, and this information is known only **after performing** stability and fatigue tests on at least one proposed asphalt mixture.

As discussed in the interview, the cited references do not suggest **performance testing** at least one asphalt mixture to determine its properties **before selecting** an asphalt mixture to use in making an interlayer. See paragraph 7 of the Declaration of Phillip B. Blankenship (Blankenship Declaration), which is attached as Exhibit A. More specifically, the cited references do not suggest balancing desirable stability and desirable fatigue performance properties when selecting a desirable asphalt mixture for creating an interlayer. See Blankenship Declaration, paragraphs 5-7.

Traditionally, when you create a roadway layer with better stability, you lose fatigue resistance and thus get reflective cracking. See Blankenship Declaration, paragraph 5. Likewise, if you make a roadway layer with desirable fatigue performance, the roadway created tends to rut because it lacks sufficient stability. See Blankenship Declaration, paragraph 5. Because these two properties have an inverse relationship to each other, one of ordinary skill in the art would not think to optimize both. See Blankenship Declaration, paragraph 5. Further, one of ordinary skill in the art would not think to do this by testing the performance of proposed asphalt mixtures

followed by selecting an asphalt mixture for an interlayer based on these performance properties.

See Blankenship Declaration, paragraph 7. With the present invention, the properties of the interlayer being created are known before it is ever created. By selecting an asphalt mixture with both optimal stability and fatigue performance, rather than just one of these properties, a superior interlayer for a roadway can be created.

As discussed in the interview, the claimed invention is specific to creating an **interlayer**. Stability and fatigue resistance are especially important properties for an interlayer. See Blankenship Declaration, paragraph 6. An interlayer needs to have some flexibility to stop reflective cracking in the base layer from reaching the overlay (a surface layer is not allowed so much flexibility because it must hold traffic directly) while having sufficient stability to support traffic indirectly. It is important that the claimed invention is directed to making an interlayer because one would not necessarily want to optimize the claimed performance properties for a base layer or a surface layer. See Blankenship Declaration, paragraph 6.

One of ordinary skill in the art would not look to Goodrich, Walter, or McDonald for ideas as to how to make an improved interlayer because these references do not even suggest making an interlayer. Furthermore, these references should not be combined with Helf because someone trying to improve Helf's interlayer would have no motivation to look at these references. See Blankenship Declaration, paragraph 6. Still further, none of the cited references provides any motivation to perform both stability and fatigue tests, as claimed by Applicant. See Blankenship Declaration, paragraph 5.

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In view of the foregoing amendments and remarks, it is respectfully submitted that the claims are now in condition for allowance and eventual issuance. Such action is respectfully requested. Should the Examiner have any further questions or comments which need be addressed in order to obtain allowance, please contact the undersigned attorney at the number listed below. Acknowledgment of receipt is respectfully requested.

Respectfully submitted,



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